Journal of Contemporary Health Law & Policy (1985-2015)

Volume 22 | Issue 2 Article 12

2006

A Shared Constitutionalism: Stem Cells and the Case for Transatlanticism

Russell Miller

A SHARED CONSTITUTIONALISM: STEM CELLS AND THE CASE FOR TRANSATLANTICISM*

Russell Miller[**]

INTRODUCTION

These have been hard times for the Transatlantic alliance.[1] One has come to expect rough patches in Franco-American relations, but the policies of the second Bush Presidency,[2] clashing with Chancellor Schröder's anti-war re-

---

* This essay is based on Professor Miller's remarks given on October 4, 2004 at the colloquium on *Ethics, Public Policy and Law: The Stem Cell Debate in the United States and the Federal Republic of Germany* sponsored by The Center for Law, Philosophy and Culture, The Catholic University of America's Columbus School of Law with The Konrad Adenaur Foundation.

** Allan G. Shepard Professor of Law, University of Idaho College of Law; B.A. (Washington State University), J.D./M.A. (Duke University), LL.M. (Johann Wolfgang Goethe University—Frankfurt am Main); Co-Editor in Chief, German Law Journal (www.germanlawjournal.com). I would like to express my gratitude to Professor William Wagner and Dr. Ursula Weide for organizing the wonderful conference at which this paper was originally presented. Thanks are owed also to Jamila Holmes (Idaho Law—Class of 2007) for excellent research assistance.

1. *See The Transatlantic Alliance: A Creaking Partnership*, THE ECONOMIST, June 5, 2004 at 22-24. *See also* Michael Cox, *Europe and the New American Challenge After September 11: Crisis – What Crisis?*, 1(1S) J. TRANSATLANTIC 37 (2003) (containing an extensive catalogue of journal and newspaper headlines and titles of speeches and remarks from hearings chronicling the tension); Craig Smith, *New Transatlantic Tension and the Kagan Phenomenon: A Primer*, 4 GERMAN L. J. 863 (2003), *available at* http://www.germanlawjournal.com/pdf/Vol04/pdf_vol_04_no_09.pdf. Ian Black says that the healing has not yet begun. Ian Black, *The Transatlantic Drift*, GUARDIAN UNLIMITED, Sept. 20, 2004, http://www.guardian.co.uk/elsewhere/journalist/story/0,,1308768,00.html.

2. The trend toward conflict was set well before the war with Iraq, based on the Bush Administration's approach to issues like the Kyoto Protocol and the International Criminal Court. *See* Thorsten Schulz, *Restoring Checks and Balances: A Panacea for*

election campaign in 2002,[3] have seemingly plunged relations between the United States and Germany, stalwart Cold War allies, into crisis as well.[4] For some, the "*grosser Teich*" ("big pond," as many Germans were once fond of referring to the Atlantic Ocean) is looking more oceanic by the day.[5]

No one has insisted upon the widening gulf as clamorously as Robert Kagan of the Carnegie Endowment for International Peace.[6] But this impression is wrong for at least two reasons. First, and most significantly, because it depends upon the gulf that has opened up between the U.S. and Germany on a number of policy issues, which are subject to shifts in the popular mood, while neglecting more fundamental commonalities. Second,

---

the Transatlantic Relationship? 9-10 (Am. Inst. for Contemp. German Stud., Working Paper, 2003), *available at* http://www.aicgs.org/Publications/PDF/schultz.pdf;

> However, it was the rise of George W. Bush in 2000, which really set the proverbial cat amongst the political pigeons, and within months of his contested election serious commentators were wondering whether or not the two sides [of the Transatlantic alliance] were at last heading for divorce.... Europeans and Americans seemed to be disagreeing on nearly every issue of international importance—from climate warming to arms control.

Cox, *supra* note 1, at 41; Michaela C. Hertkorn, *Why German-US Relations Still Matter to the Transatlantic Alliance* 8 (Düsseldorf Inst. for Foreign and Security Policy, Working Paper No. 7, 2004), *available at* http://www.ciaonet.org/wps/hem07/Hem07.pdf ("The continuing flare up of German anti-Bush-anti-Americanism in news seemed to put German in confrontation with the US already back in July and August 2001.").

3. Hertkorn, *supra* note 2, at 11.

4. *See, e.g.*, *Is It Rejection or Seduction*, ECONOMIST, July 31, 2004, at 45-46 (citing a survey by the Allensbach Institute that found Germans have increasingly negative views of Americans); *Mr. Schröder Goes to Washington*, ECONOMIST, Mar. 1, 2004 ("But American-German relations, while improved, are still rather wooden.").

5. Thorsten Schulz assumes, almost without comment, the fact of the disrepair from which the transatlantic relationship must be rescued in his AICGS/DAAD Working Paper. Thorsten Schulz, *Restoring the Checks and Balances: A Panacea for the Transatlantic Relationship?* 1 (Am. Inst. for Contemp. German Stud., Working Paper, 2003), *available at* http://www.aicgs.org/Publications/PDF/schultz.pdf. The divergence of policy and perception between the U.S. and Europe is confirmed by the German Marshall Fund and the Compagnia di San Paolo. *See* Transatlantic Trends Overview: 2005, http://www.transatlantictrends.org (last visited Feb. 19, 2006). The survey also recognizes the complexities that operate to make generalizations about the Transatlantic alliance difficult. *Id.*

6. ROBERT KAGAN, OF PARADISE AND POWER 1 (2003) ("It is time to stop pretending that Europeans and Americans share a common view of the world, or even that they occupy the same world.").

this conclusion relies upon a willful blindness to the comparative sample that gives it force.[7]

As to the first critique, Kagan and many other commentators seem persuaded that divergence and disagreement over policy and in popular culture are adequate measures of the rot that has supposedly gotten into the Transatlantic alliance. Thus, the death penalty, gun ownership and social welfare come in for consideration. So, too, does the popularity of Michael Moore in Europe.[8] Of course, the Iraq war is the policy agenda *de jour* that serves as the definitive diagnostic device leading to the conclusion that the United States and Germany are drifting apart.

With respect to the second critique, in remarking upon the dramatic differences between the United States and Europe, Transatlantic pessimists do not dwell on the determinative character of their self-selected comparative sample. But the dissimilarities between the United States and Europe fade from nearly any other comparative perspective. What if, for example, the focus shifted away from distinctions *within* the Transatlantic alliance (including the United States and Germany[9]) to a consideration of the distinctions *between* the Transatlantic alliance and (perhaps more appropriate for today's geopolitical climate) the Arab world?

Human stem cell research, the focus of the present proceedings, simply adds grist to this mill. Taking the United States and Germany, one finds totally dichotomous policies. The United States liberally permits the practice and only imposes restrictions on the availability of federal funds for projects involving human stem cell research.[10] Germany, on the other hand, which only recently softened its comprehensive ban on the practice, still

---

7. *See* Russell Miller, *The Shared Transatlantic Jurisprudence of Dignity*, 4 GERMAN L.J. 925, 925-26 (2003), *available at* http://www.germanlawjournal.com/pdf/Vol04No09/PDF_Vol_04_No_09_925-934_SI_Miller.pdf.

8. A recent *Deutsche Welle* article compares Michael Moore's popularity in Germany with that of Jerry Lewis in France. *See The German Cult of Michael Moore*, DEUTSCHE WELLE, *at* http://www.dw-world.de/dw/article/0,,1006907,00.html. Michael Moore's sales in Germany are staggering: in the first year of sales for *Stupid White Men*, 1.1 million copies were sold in Germany as compared to 630,000 in United States. Stephen Zeitchik, *Michael Moore: The New JFK?*, PUBLISHER'S WEEKLY.COM, Oct. 27, 2003, *available at* http://www.publishersweekly.com/article/CA331744.html?pubdate=10%2F27%2F2003&display=archive.

9. Not to mention the degrees of divergence *within* the Transatlantic alliance that undermine the coherence of Kagan's comparative sample. Consider, for example, "red" and "blue" America or "old" and "new" Europe.

10. *See, generally*, Kara L. Belew, *Stem Cell Division: Abortion Law and its Influence on the Adoption of Radically Different Embryonic Stem Cell Legislation in the United States, the United Kingdom, and Germany*, 39 TEX. INT'L L. J. 479 (2004).

tightly regulates the limited exception to that ban.[11] Accepting the respective policies on this issue as exceptionally indicative of the state of the Transatlantic alliance, it would seem to be difficult to dispute that, in considering the United States and Germany today, we are talking about countries as different as "Mars and Venus."[12]

I beg to differ. Underlying the countries' diametrical approaches toward human stem cell research is a shared brand of liberal constitutionalism that transcends matters of malleable policy.[13] I believe that an examination of this fundamental common ground is a better test of the firmness of the foundations of Transatlanticism. Ironically, Kagan seems to agree: "[a]fter all, it is more than a cliché that the United States and Europe share a set of common Western beliefs. Their aspirations for humanity are much the same, even if their vast disparity of power has now put them in very different places."[14]

In this paper, I argue that the tensions plaguing the Transatlantic alliance, and the intensity of the alarm they have triggered, are overblown. Washington and Berlin may not see exactly eye-to-eye these days, but Americans and Germans occupy decidedly the same world.[15] This conclusion rests on my examination of a shared Transatlantic constitutionalism, as exemplified by probable United States and German constitutional responses to human stem cell research. A constitutional analysis of this issue does not support the conclusion that "the United States and Europe are fundamentally different today."[16] To the contrary, it reveals that, even on an issue for which they reach such conflicting conclusions, the United States and Germany have the most important things in common.

---

11. *Id.*

12. KAGAN, *supra* note 6, at 3.

13. *See* Belew, *supra* note 10.

14. KAGAN, *supra* note 6, at 103.

15. *Contra* KAGAN, *supra* note 6, at 3 ("It is time to stop pretending that European and Americans share a common view of the world, or even that they occupy the same world.").

16. *Id.*, at 6.

A SHARED CONSTITUTIONALISM

I. CONSTITUTIONALISM AS THE APPROPRIATE MEASURE OF TRANSATLANTICISM

A. Constitutionalism

Louis Henkin notes that "Constitutionalism is nowhere defined," but he has produced a catalogue of the key elements of constitutionalism as a principle of social construction.[17] Henkin proposes that constitutionalism consists of "popular sovereignty," a "prescriptive... blueprint," "government ruled by law and governed by democratic principles," "limited government," "respect [for] individual rights," and "institutions to monitor and assure respect for the constitutional blueprint."[18] Daniel Lev gives us a related, if more succinct, description: "political process, with or without a written constitution, is more or less oriented to public rules and institutions intended to define and contain the exercise of political authority. At the core of constitutionalism is legal process."[19] Lev's characterization of constitutionalism proves incredibly important in the context in which we are operating, namely the rarefied fields implicated by the debate over human stem cell research: morality, medicine and the conceptualization of life itself. One might be inclined to believe that such matters are better left to other institutions, like a society's religious or scientific communities, but societies operating under constitutionalism channel them towards the law.

---

17. Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY 39 (Michel Rosenfeld ed., 1994).

18. *Id.* at 40-42.

19. Daniel S. Lev, *Social Movements, Constitutionalism and Human Rights: Comments From the Malaysian and Indonesian Experiences*, *in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 139 (Douglas Greenberg, et al. eds., 1993). *See* Michel Rosenfeld, *Modern Constitutionalism as Interplay Between Identity and Diversity*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY, *supra* note 17, at 3 ("[I]n the broadest terms, modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights.").

The fact that the debate will be subject to legal (constitutional) resolution necessarily determines a society's approach to the debate.[20]

Alongside this structural and political content, constitutionalism also draws a map of a polity, which necessarily embraces "identity and difference."[21] Michel Rosenfeld explains that "constitutionalism only makes sense in relation to sociopolitical settings that can be construed as revolving around the two opposite poles of identity, and diversity or difference."[22] A too homogenous community will not require the structural and political safeguards secured by constitutionalism. At the same time, a too diverse community cannot be maintained such safeguards. This facet of constitutionalism is also essential to the debate over human stem cell research. The polarized state of the debate exemplifies both the strength of the *differences* hemmed in by American and German constitutionalism, just as the parties' engagement *in* the debate reveals the *identity* confirmed by American and German constitutionalism.

The last point necessarily leads to the next. Because constitutionalism serves as a proxy for a particular community's unique dynamism and tension, constitutions, and the high court interpretations of them, are a far better measure of the nature of a particular community than are the policies pursued by a given moment's majority. The very nature of constitutionalism is to lock away the fundamental values of a society, secure from the buffeting whim of the majority. In this sense, to look into a constitution is to look into the heart of a society.[23] Not only will policy approaches to issues like human stem cell research come to be measured against the constitution

---

20. "Religious, aristocratic, military, or charismatic regimes, whatever their constitutional or other overlay, imply quite different orientations with other institutional arrangements and legitimating ideologies." Lev, *supra* note 19, at 140.

21. Rosenfeld, *supra* note 19, at 4.

22. *Id.*

23. Lev explains:

> Because the political contentions that bracket constitutionalist demands are local matters, fed by local issues, interests, values, and historical circumstances, the outcomes (constitutionalist or not in whatever measure) are comprehensible essentially only in local terms. Neither constitutions nor constitutionalism can be transferred. The point should be obvious, but is often obscured by proprietary claims to the correct model. The dimensions of French constitutionalism are not altogether clear to Americans or to Japanese, the Indian or Norwegian cases seem odd anywhere else, and so on because the political compromises worked out historically, the tacit social and economic agreements made along the way, the play of local habit and values and cultural assumptions, the ways in which change proceeds, are all taken for granted at home but are unfathomable away.

Lev, *supra* note 19, at 141.

in a reactive process (if they are called into question, as the difference inherent in constitutionalism promises) but constitutionalism also proactively shapes the community. Larry Siedentop brilliantly captures this creative function of constitutionalism:

> Thus, by influencing the way in which we conceive of our own interests, and by providing a kind of chart or road map which organizes a particular social landscape, constitutions enter into our very souls. They help us to frame intentions and to act.
>
> As we have seen, there are some respects in which liberal constitutions have a fundamental impact on citizens' lives and mark out borders on the maps of their personal identity. Constitutions have this potential of creating provinces in the mind.[24]

Whatever the policy differences that emerge between the United States and Germany on the issue of human stem cell research, their shared constitutionalism says much more about the likely endurance of their relationship. Because of this shared constitutionalism, the United States and Germany have fundamental political structures and values in common. One such common structure is the rejection of absolutism; constitutionalism means that both societies are likely to employ a method in resolving a socially divisive issue like human stem cell research in a manner that does not wholly satisfy either side in the debate.

B. Difficulties as Regards the Stem Cell Issue

Human stem cell research is neither easily nor reliably susceptible to comparative constitutional mapping of the kind I propose to undertake here, both because the United States and German constitutions are silent on the specific question and because neither country's constitutional court has, as yet, addressed the issue directly.[25] The best one can do is refer, by analogy, to similar (but admittedly distinguishable) decisions of the Supreme Court and the *Bundesverfassungsgericht* interpreting what we think might be the relevant provisions of the respective constitutions. This is, of course, not all guesswork. We can know, with some level of certainty, which constitutional provisions and precedents will be implicated by (an eventual) stem cell case before these courts. We must admit from the beginning, however, that this effort is fraught with some degree of imprecision.

---

24. LARRY SIEDENTOP, DEMOCRACY IN EUROPE 96-97 (2000).

25. GERMAN NATIONAL ETHICS COUNCIL, OPINION ON THE IMPORT OF HUMAN EMBRYONIC STEM CELLS 7 (2001), *available at* http://www.ethikrat.org/_english/publications/stem_cells/Opinion_Import-HESC.pdf [hereinafter GERMAN NATIONAL ETHICS COUNCIL].

The field into which one is most reasonably drawn by this imperfect exercise in analogy is the field of abortion rights, which also raises the specter of the constitutional protection of life and human dignity. This field also has the additional merit of presenting similarly dichotomous United States and German policies,[26] thus providing an opportunity to test the thesis that, in spite of these differences, one finds more meaningful similarities in an examination of the constitutional method brought to bear on the issue. It must be emphasized, however, that for all that abortion and human stem cell research may have in common, they are not the same juridical issue and the analogy has its limits. In fact, as will prove central to my discussion below, very different constitutional interests are in conflict in the stem cell and abortion contexts.

There are other lines of constitutional jurisprudence that might, by analogy, inform this comparative constitutional analysis of human stem cell research. Each, however, proves more imperfect than the abortion analogy. For example, the "life" and "dignity" issues raised by the death penalty differ significantly from those raised by human stem cell research because the death penalty involves a threat to those constitutional values originating with the state (as executioner) and not a private actor (whether a pregnant woman and her doctor in the abortion context, or a scientific researcher in the stem cell context).[27] Some might also argue that the death penalty should be distinguished because it does not involve a question of "innocent" life. The "life" and "dignity" issues raised by the "death with dignity" debate also differ significantly from those raised by human stem cell

---

26. *See* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 336 (2d ed. 1997) (German abortion jurisprudence "stands in sharp contrast to the doctrinal analysis contained the American case of *Roe v. Wade*."); DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 310 (1994) ("The critical case was the famous 1975 abortion decision, which produced a result the polar opposite of that our Supreme Court had reached two years earlier in *Roe v. Wade*: ..."). Kara Belew recognizes both the usefulness of the analogy to abortion jurisprudence and the divergent U.S. and German responses to the abortion issue:

> The United Kingdom, the United States, and Germany are nations with relatively similar institutions, political ideologies, religions, and marketplace forces. Yet, these nations have enacted radically different legislation in responding to the same basic questions: When does life begin? How should science and morality interact? Is it ethically permissible to destroy a developing human life in order to spare another? The difference between these nations in their recently enacted ES cell legislation is largely reflective of divergent historical legacies with respect to the legal permissibility and social acceptability of abortion.

Belew, *supra* note 10, at 481.

27. For a discussion of the similarities in U.S. and German death penalty jurisprudence *see*, Miller, *supra* note 7.

research in that physician-assisted suicide is typically seen as a consensual act.

Thus, in the absence of Supreme Court and *Bundesverfassungsgericht* decisions on point, I will be analogizing to those courts' abortion jurisprudence to make my case about a shared constitutionalism, and a common constitutional method, that would likely prevail in the context of human stem cell research, whatever distinct result the two systems might reach on the question. I call this common constitutional method "constitutional balancing." It is the interpretive method employed by the constitutional courts of the United States and Germany in resolving the abortion issue. Importantly, it requires these courts to reject absolutist claims regarding competing constitutional interests.

II. A SHARED CONSTITUTIONAL METHOD—BALANCING

A. Balancing as a Method of Constitutional Interpretation

I teach my students that constitutional law is really only "constitutional reading."[28] Constitutions typically are cast in general terms,[29] and thus, constitutionalism as a principle of social organization is infused with interpretive method and doctrine. American and German constitutional adjudicators rely on a shared set of "interpretive constraints,"[30] including, *inter alia*, textualism, originalism, and structuralism.[31] They also frequently seek to balance competing constitutional interests as a method for giving their respective constitutions meaning.[32] T. Alexander Aleinikoff explains

---

28. LAURENCE H. TRIBE, I AMERICAN CONSTITUTIONAL LAW 32 (§ 1-12) (3rd ed. 2000) ("There is, of course, always the need to face, here as elsewhere, the ordinary problems of reading: issues of ambiguity, vagueness, obscurity, and the like.").

29. NORMAN DORSEN ET AL., COMPARATIVE CONSTITUTIONALISM 139 (2003).

30. *Id.*

31. *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189-1190 (1987); PHILIP BOBBITT, CONSTITUTIONAL FATE (1982); Winfried Brugger, *Legal Interpretation, Schools of Jurisprudence , and Anthropology: Some Remarks from a German Point of View*, 42 AM. J. COMP. L. 395 (1994); KOMMERS, *supra* note 26, at 40-49.

32. The authors of the casebook *Comparative Constitutionalism* include a section on balancing in the book's chapter on "Constitutional Interpretation." DORSEN ET AL., *supra* note 29, at 196-198, 207-211. Aleinikoff cites the following, from a broad range of areas of the law, as among the leading examples of the Supreme Court's balancing jurisprudence: Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) (commerce clause); Helvering v. Gerhardt, 304 U.S. 405 (1938) (intergovernmental immunities); Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940) (civil liberties); Schneider v. States, 308 U.S. 147 (1939) (free speech). In German constitutional law balancing draws on the

that balancing, as a method of constitutional reasoning, involves "identification, valuation, and comparison of competing interests," by "identifying interests implicated by the case and [reaching] a decision or [constructing] a rule of constitutional law by explicitly or implicitly assigning values to the identified interests."[33]

Balancing, as a constitutional method, is particularly responsive to the tensions and polarity inherent in constitutionalism.[34] It facilitates the fact that constitutional dispute resolution necessarily must have the effect that one party will be disadvantaged by a decision, but it permits the constitutional adjudicator to actualize the competing interests implicated by the dispute. Thus, the question is not whether one interest is so predominant that it wholly supersedes the other, but whether one of two fully viable interests outweighs the other because, in the circumstances, it is more compelling or more important than the other. Aleinikoff explains: "One interest does not override another; each survives and is given its due."[35] This method distinctly rejects Dworkin's absolutist understanding of the *rights* secured by a constitution,[36] precisely the view that a society's interest groups typically hold of the rights they assert. This, of course, is nowhere more clear than in the polarized debates over abortion and human stem cell research.

Aleinikoff is critical of the dominance balancing has obtained in American constitutional law: "Balancing has turned us away from the Constitution, supplying 'reasonable' policymaking in lieu of theoretical investigations of rights, principles and structures."[37] Still, he recognizes that

---

tradition of *Interessenjurisprudenz* (interest-oriented jurisprudence) in statutory interpretation and finds formal fulfillment in the *Grundsatz der Verhältnismässigkeit* (principle of proportionality), which provides that allowable infringements upon individual rights must nonetheless be proportional. The third element of the principle of proportionality requires that the challenged state action "outweigh the individual's interest, i.e. basic right on balance." NIGEL FOSTER & SATISH SULE, GERMAN LEGAL SYSTEMS AND LAWS 170-172 (3rd ed. 2002). *See* BVerfGE 30, 1; 35, 202 (*Lebach Case*); KOMMERS, *supra* note 26, at 46-48; CURRIE, *supra* note 26, at 20. The Grundgesetz explicitly incorporates the doctrine of balancing in determining compensation for the expropriation of property: "Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected." Article 14.3 GG.

33. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943, 945 (1987).

34. *See* Rosenfeld, *supra* note 19.

35. Aleinikoff, *supra* note 33, at 946.

36. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

37. Aleinikoff, *supra* note 33, at 1004. Balancing has its defenders. *See* Steven H. Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA

some such process must be a part of any practical legal system."[38] A similar ambivalence can be found in the German scholarly literature on balancing. The method continues to come in for widespread acceptance,[39] but Karl-Heinz Ladeur recently published *Kritik der Abwägung in der Grundrechtsdogmatik* (*Critique of Balancing in Fundamental Rights Dogma*) in which he rejects balancing as a standardless treatment of constitutional provisions meant to free the state from its role as the antagonist of fundamental rights.[40]

B. Balancing in the Abortion Rights and (by analogy) the Stem Cell Debate

The struggle to balance the constitutional interests in conflict in the abortion rights context has come to dominate the jurisprudence. This is true of the Supreme Court's decisions in *Roe v. Wade* and *Planned Parenthood v. Casey*;[41] and it is every bit as true of the *Bundesverfassungsgericht's Abortion I* and *Abortion II* decisions.[42] Balancing might have been the only viable approach to a constitutional dispute fueled by inconsistent, intensely asserted constitutional interests. As Laurence Tribe explains, "[t]he constitutional quandary presented by abortion involves two central questions. First, what precisely is the right that is at stake for the pregnant woman? Second, how is that right to be balanced against the interest in preserving unborn life?"[43]

L. REV. 915 (1978); Steven H. Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983).

38. Aleinikoff, *supra* note 33, at 943.

39. *See, e.g.*, Udo di Fabio, *Grundrechte als Wertordnung*, 59 JURISTENZEITUNG 1 (2004); Bernhard Schlink, *Der Grundsatz der Verhältnismassigkeit*, *in* FESTSCHRIFT 50 JAHRE BUNDESVERFASSUNGSGERICTH 445 (Peter Badura and Horst Dreier eds., 2001); Peter Lerche, *Grundrecthsschranken*, *in* 5 HANDBUCH DES STAATSRECHTS, 775 (Josef Isensee and Paul Kirchhof eds., 2d ed. 2001).

40. KARL-HEINZ LADEUR, KRITIK DER ABWÄGUNG IN DER GRUNDRECHTSDOGMATIK (2004).

41. Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

42. BVerfGE 39, 1 *translated in* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 336-346 (2d ed. 1997); BVerfGE 88, 203, *translated in* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 349-355 (2d. ed. 1997).

43. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1352 (2d ed 1988).

1. Balancing and Abortion in the Supreme Court

The Supreme Court's opinions in *Roe* and *Casey* are archetypal examples of the balancing method in constitutionalism, both as a distinct literary style and as an approach to the substantive meaning of the constitution.[44]

As a substantive matter of constitutional law, in *Roe*, Justice Blackmun's majority of the Supreme Court sought to strike a balance between a woman's Fourteenth Amendment right to privacy and a State's interest in protecting the potential life of a fetus.[45] Others also have characterized the Supreme Court's substantive effort in *Roe* as an act of balancing:

> Justice Blackmun's opinion in *Roe* examined two state interests, protecting the life and health of the mother and protecting potential life, and *balanced* them against the woman's right to privacy and autonomy. In implementing that *balancing process*, Justice Balckmun described how he believed the state's interests change while the woman's interest remains constant during the gestation period.[46]

Justice Blackmun's majority considered the weight of the competing interests implicated by abortion at distinct points in a pregnancy, with the now well-known conclusion that the woman's privacy interests were to be given precedence prior to fetal viability and that during this period the woman is "free to determine, without regulation by the State, that... [her] pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State."[47] After fetal viability, Justice Blackmun's majority found that the balance tilts in favor of the State's interest in potential life and the State "may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."[48] Nineteen years later, in *Planned Parenthood v. Casey*, the Supreme Court reaffirmed *Roe's* essential holding.

---

44. "The new form of opinion writing [balancing] was more than a change in literary style, it reflected a new way of looking at constitutional law influenced by almost half a century of ferment in legal philosophy." Aleinikoff, *supra* note 33, at 954.

45. *Roe*, 410 U.S. at 153. The Court based a woman's right to privacy in the Fourteenth Amendment and not the Ninth Amendment. *Id.* The right is found among the substantive due process protections of the Fourteenth Amendment.

46. Alan Brownstein & Paul Dau, *The Constitutional Morality of Abortion*, 33 B.C. L. REV. 689, 745-47 (1992) (emphasis added). *E.g.*, Laurence Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973) ("The Court purports to be balancing the 'relative weights of the respective interests involved' in abortion.") (citations omitted).

47. *Roe*, 410 U.S. at 163.

48. *Id.* at 163, 164.

From the opening section of his opinion in *Roe*, Justice Blackmun made use of balancing terminology and metaphors. He described the Court's task as being one of "constitutional measurement,"[49] and he summarily dispatched the absolutist claims for the rights implicated by the case.[50] Characterizing the work of the Court as a matter of "weighing" and not the discernment and actualization of absolutist constitutional values, Justice Blackmun cast the matter as a set of scales on which the qualified right to personal privacy would be "considered against important state interests in regulation."[51] The weights on the scales were then adjusted according to the "compelling," "important," or "legitimate" nature of the respective interests at distinct points in a pregnancy.

The plurality opinion of Justices O'Connor, Kennedy and Souter in *Casey* did nothing to disturb the balancing method that had guided Justice Blackmun's decision in *Roe*. In fact, by weighing the pre-viability right to an abortion against the regulatory expression of a State's "substantial interest in potential life," the plurality reinvigorated the role of balancing in this line of jurisprudence. The plurality explicitly placed the implicated interests on the scales at all points in a pregnancy, thereby disposing as formalistic the criticisms of *Roe* that viewed Justice Blackmun's reliance on fetal viability as the trigger for the State's interest in potential life.[52] As Justice Blackmun had done in *Roe*, the *Casey* plurality unambiguously rejected absolutist claims for the interests at stake.[53] The plurality opinion in

---

49. *Id.* at 116.

50. *Id.* at 154 ("The privacy right involved, therefore, cannot be said to be absolute.").

51. *Id.* at 154.

52. Aleinikoff joins these critics, concluding that Justice Blackmun "set up [the] constitutional problem in balancing terms, but [decided] the case without actually balancing... the Court [sent up] smoke, supplying words that look like a balance, but in fact are something quite different... [Justice Blackmun's 'weighing' really amounted to] a definition of viability, not an explanation of value." Aleinikoff, *supra* note 33, at 976. *See* KOMMERS, *supra* note 26, at 336 ("the doctrinal analysis contained in the American case of *Roe v. Wade*.") (citation omitted). I disagree with this characterization of Justice Blackmun's opinion. Although I argue that the plurality opinion in Casey is more thorough about balancing the competing interests in privacy and life, I do not read Roe as being absolutist regarding the right to privacy in the pre-viability context. I rather agree with Laurence Tribe that: "Underlying the result in *Roe v. Wade* is a conviction that the safety and liberty of a life in being are of *greater* constitutional value than the protection of a nonviable fetal life." TRIBE, *supra* note 43, at 1358 (emphasis added). Justice Blackmun clearly concluded that fetal claims "to society's compassion and sustenance—like the claims of infants, indigents, and the infirm—are powerful both morally and legally," but that, on balance, they are outweighed by the privacy interests of women. *Id.*

53. "Though abortion is conduct, it does not follow that the States is entitled to proscribe it in *all* instances." Casey, 505 U.S. at 852 (emphasis added).

Casey also is littered with the terminology and metaphors of balancing. On seven occasions the plurality characterized the constitutional work in which it was engaged as a matter of "weighing."[54] And again, the plurality found that balancing exercise affected by the "substantial," "compelling," or "important" character of the respective interests.

2. Balancing and Abortion in the Bundesverfassungsgericht

The *Bundesverfassungsgericht's* adoption of the balancing method in the abortion context is somewhat more surprising considering the fact that the Court has interpreted the fundamental rights in the *Grundgesetz* as forming a hierarchy of rights in which those at the top categorically trump those below them. Nonetheless, Donald Kommers sees the Court's *Abortion I* and *Abortion II* decisions as "attempts to balance" conflicting rights secured by the constitution.[55] At issue were the constitution's provisions securing human dignity[56] and the right to life,[57] on one hand, and a woman's right to autonomy and the free development of her personality,[58] on the other.

Confronting these contending interests, the *Bundesverfassungsgericht* concluded that "the Basic Law also protects the life developing within the mother's womb as an independent legal interest" beginning on the fourteenth day after conception.[59] The Court then established the "supreme value" to be attached to human life in the German constitutional order.[60]

---

54. Planned Parenthood v. Casey, 505 U.S. 833, 853, 855, 871, 896, 917, 976, and 982 (1992).

55. KOMMERS, *supra* note 26, at 336 and 347 ("The German distinction between fetal life and persons is noteworthy in comparative perspective because it allowed the Constitutional Court to engage in a balancing process largely absent in the seminal American case of *Roe v. Wade*.") (citation omitted).

56. Art. 1.1 GG ("Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.").

57. Art. 2.2 GG ("Every person shall have the right to life and physical integrity.").

58. Art. 2.1 GG ("Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.").

59. BVerfGE 39, 1 (36), *translated in* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 336-346 (2d ed. 1997).

60. *Id.* The Court based this valuation on the "categorical inclusion of the inherently self-evident right to life in the Basic Law," a departure from the Weimar Constitution that the Court explained principally as a reaction to the 'destruction of life unworthy to live,' the 'final solution,' and the 'liquidations' that the National Socialist regime carried out as governmental measures. Article 2.2(1) of the Basic Law implies, as does the real of the death penalty by Article 102 of the Basic Law, 'an affirmation of the fundamental value of human life and of a state concept which emphatically opposes the views of a political

The Court did not dismiss the woman's interest in self-determination,[61] but found that it fails to match the great weight to be assigned to the fetus's life:

> [T]his right is not given without limitation—the rights of others, the constitutional order, and moral law limit it. [The right to personality] can never confer a priori the authority to intrude upon the protected legal sphere of another... much less the authority to destroy [this sphere] as well as a life.... No compromise is possible.... *Pursuant to the principle of carefully balancing competing constitutionally protected positions*,... [the state] must give the protection of the unborn child's life priority.[62]

Significantly, the Court explicitly characterized its method as a matter of balancing. This seems to have obliged the Court to acknowledge that some range of circumstances might occur in which the "unborn's right to life may place a substantially greater burden on the woman than that normally connected with a pregnancy [and according to which it had conducted its original weighing of the interests]."[63] In these circumstances, the Court found that the scale would tip back towards the woman's constitutional interest in autonomy, as measured by the reasonableness of requiring a woman to "continue her pregnancy" in the face of grave injury to her health or "other cases where pregnancy would subject the woman to extraordinary burdens... [including]... eugenic, ethical (criminological), and social [considerations]."[64]

The Court again applied the balancing method in the *Abortion II* case, explaining its effort in these terms: "The scope of the duty to protect the unborn is to be determined by weighing its importance and need for protection against the conflicting interests of other objects deserving of legal protection."[65] In its *Abortion II* decision the Court explicitly recognized that the balancing method it had brought to bear on the abortion question necessarily required a rejection of an absolutist approach to the fetus's right to life. The consequence of this balancing approach was, of course, implicit in the "unreasonable burden" exception the Court had outlined in *Abortion I*. In *Abortion II* the Court explained:

---

regime for which the individual life had little significance and which therefore practiced unlimited abuse in the name of the arrogated right over life and death of the citizen. *Id.* at (36, 37).

61. *Id.* at (43). ("It is true that the right of a woman freely to develop her personality also lays claim to recognitions and protection.").

62. *Id.* (emphasis added).

63. *Id.* at (48).

64. *Id.* at (49).

65. BVerfGE 88, 203 (203), *translated in* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 349-355 (2d. ed. 1997).

> But since the Basic Law does not elevate the protection of the [unborn] life above all other legal values, *the right [of the unborn] to life is not absolute.* It is not elevated above all other legal values without exception; this is clear from Article 2.2.... Rather, the scope of the state's duty to protect the unborn *is to be determined by weighing* its importance and need for protection against other conflicting legal values. The legal values affected by the right to life of the unborn include the woman's right to protection and respect for her own dignity (Article 1.1), the rights to life and physical integrity, and the right to personal development (Article 2.1).[66]

The Court unequivocally reasserted the unborn's right to life as the superior value, but it also more clearly asserted that this right, *on balance*, "does not extend to the point of eliminating all of the woman's legal rights [to self-determination]."[67]

3. Balancing and Stem Cells

Again, noting the limits of the analogy between the stem cell and abortion questions, I expect the Supreme Court and the *Bundesverfassungsgeright* would employ the balancing method of constitutional method to which each court resorted in the abortion context if they were to consider a challenge to the constitutionality of human stem cell research.[68] This would especially be the case if each of the contending interests in the dispute succeeded in characterizing their position as the assertion of a distinct constitutional right.

Beyond suggesting this common constitutional method, the analogy to the abortion jurisprudence of the two courts breaks down. Most significantly, human stem cell research does not implicate the compelling constitutional interest in a woman's right to privacy or autonomy, particularly as animated by gender equality concerns. This interest was given immense, nearly determinative weight by both courts in the abortion cases.[69] In the American

---

66. *Id.* at (253, 254) (emphasis added).

67. *Id.* at (255).

68. Even the German National Ethics Council, which is not bound by constitutional or legal method, recognized that the balancing method would be brought to bear in a constitutional analysis of the stem cell issue. GERMAN NATIONAL ETHICS COUNCIL, *supra* note 25, at 17 and 21. ("From birth on, moral respect becomes unconditional, and the right to life is no longer subject to any balancing of considerations or differentiation.") ("[I]t must be possible, in the case of embryos *in vitro* just as in that of embryos *in vivo*, to balance both the moral and the legal precepts of the protection of life against competing obligations and objects of protection.").

69. *See* D.A. Jeremy Telman, *Abortion and Women's Legal Personhood in Germany: A Contribution to the Feminist Theory of the State*, 24 N.Y.U. REV. L. & SOC.

system a number of constitutional interests seeking to avoid restraints on human stem cell research might be asserted in the place of a woman's privacy right, including property[70] and free speech concerns.[71] Similarly, in the German system,[72] the research and scientific communities might assert rights to occupational freedom,[73] property,[74] and academic/scientific freedom.[75] Furthermore, individuals suffering from diseases which might be impacted beneficially by human stem cell research also might assert the right to freely develop their personality under the German constitution.[76] None of these, however, would seem to carry more emotional, not to mention constitutional, authority than the woman's right to privacy and autonomy.

Even when presented with potentially less weighty constitutional interests on the side of permitting human stem cell research, there is no reason to think that the scales in this balancing effort decidedly would tip in favor of

---

CHANGE 91 (1998). The Supreme Court, in both Roe and Casey, spoke clearly about the unique burdens confronted by a woman, and a woman only, in pregnancy. This fact gave the Court pause in considering whether the state could impose upon a woman the obligation to complete a pregnancy. In *Roe*, Justice Blackmun wrote: "The detriment that the State would impose upon the pregnant woman by denying the choice [for an abortion] altogether is apparent." Roe, 410 U.S. at 153. In Casey, the plurality expressed the matter in these terms: "We conclude, however, that the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty, require us to [draw a specific rule regarding abortion from what in the Constitution is but a general standard]." Casey, 505 U.S. at 869. Similarly, the *Bundesverfassungsgericht* explained that an exception to the priority given to protecting unborn life is "justified because... of the unique relationship between mother and child.... There are further duties that affect the woman's entire existence: the duty to carry and bear the child and to care for it many years after its birth." BVerfGE 88, 203 (256).

70. U.S. CONST. AMENDS. V and XIV.

71. U.S. CONST. AMEND. I (incorporated against the States by the Fourteenth Amendment).

72. GERMAN NATIONAL ETHICS COUNCIL, *supra* note 25, at 6 ("The National Ethics Council unanimously holds that research on embryonic stem cells touches upon fundamental values of our society and posses questions as to the subject-matter and scope of elementary constitutional principles such as human dignity and the protection of life, as well as scientific freedom.").

73. Art. 12 GG.

74. Art. 16 GG.

75. Art. 5.3 GG. "After all, in the debate on the permissibility of stem cell research, the legal and moral status of early embryonic life is not the only relevant consideration; limitation of the freedom of research guaranteed by Article 5(3) of the Basic Law, too, calls for justification derived from the Constitution itself." GERMAN NATIONAL ETHICS COUNCIL, *supra* note 25, at 26.

76. Art. 2.1 GG. *See* GERMAN NATIONAL ETHICS COUNCIL, *supra* note 25, at 23.

protecting the embryo from the destructive derivation process necessary for human stem cell research. This is so because neither system seems likely to recognize a protected constitutional interest in life in this context. In the abortion context, the United States Supreme Court first recognized a state's compelling interest in protecting the life of the fetus at viability.[77] As the plurality noted in *Casey*, through medical and technological advances this "moment" has been inching backwards since the Court's decision in *Roe*, from 28 weeks in 1973 to 24 or 23 weeks in 1992.[78] While this march might continue to points radically earlier than could have been imagined by Justice Blackmun thirty years ago when he adopted the viability measure, not to mention the more contemporary Justices of the *Casey* plurality from only a decade ago,[79] viability is still far removed from the stage of embryonic development (around fourteen days, though some researchers would push as far out as thirty days) at which a standard for stem cell derivation seems to have settled.[80] The claim that pre-viable embryos should not be credited with a constitutional interest in life is strengthened by the fact that "at least one [United States] federal court has found that human embryos lack standing to bring suit because they are not persons within the meaning of the Constitution."[81] In the *Abortion I* case the German Court recognized a much

---

77. Roe v. Wade, 410 U.S. 113, 163 (1973).

78. Planned Parenthood v. Casey, 505 U.S. 833, 860 (1992).

79. Justices O'Connor, Kennedy and Souter, in recognizing this phenomenon, nonetheless endorse viability as the appropriate standard for triggering the State's interest in protecting life: "Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided; which is to say that no change in *Roe's* factual underpinning has left its central holding obsolete, and none supports an argument for overruling it." Casey, 505 U.S. at 860.

80. This was the conclusion of the U.K.'s otherwise very liberal Warnock Commission. *See* Belew, *supra* note 10, at 490:

> The Warnock Committee ultimately determined that embryonic experimentation was ethically acceptable up until the appearance of a primitive streak, which denotes the emergence of unique individualized characteristics in the embryo and occurs on approximately the fourteenth day of development. After the fourteenth day of development, the Committee recommended that further experimentation should be criminally prohibited.

Id. This was also the conclusion of the liberal Clinton-era Human Embryo Research Panel. *Id.* at 501 ("Specifically, the panel identified the derivation of human embryos as ethically appropriate to receive federal funds, while discouraging the use of embryos after the fourteenth day of development."). The German National Ethics Council defines derivation as the process of extracting pluripotent stem cells through the destruction of human embryos "in the first few days of development." *See* GERMAN NATIONAL ETHICS COUNCIL, *supra* note 25, at 4 & 8 (2001).

81. *See* Belew, *supra* note 10, at 498-499:

more broadly conceived protected interest in embryonic life, from as early as fourteen days following conception.[82] This, however, would make stem cell derivation occurring prior to the fourteenth day of embryonic development an act with no implications for a constitutionally protected interest in life. As noted above, there is considerable acceptance of a fourteen day standard for derivation.

In *Doe v. Shalala*, the would-be plaintiff, Mary Doe, was described in the amended complaint as a "pre-born child in being as a human embryo." She and another individual with Down's syndrome sought a preliminary injunction seeking to enjoin the activity of the National Institutes of Health (NIH) Human Embryo Research Panel on the grounds that Section 101 of the NIH Revitalization Act of 1993 violated the U.S. Constitution. Their immediate goal was to forbid the Panel from recommending to the NIH or the secretary of Health and Human Services that research on human embryos be supported by federal funding.

Mary Doe was allegedly among more than 20,000 embryos existing in U.S. in vitro laboratories. After the Revitalization Act passed, the NIH began receiving applications requesting financial aid for research on human embryos. During the fall of 1993 and pursuant to the law, a panel was appointed and charged with preparing a report concerning "moral and ethical issues raised by the use of human embryos in research" and creating federal funding "guidelines." Mary Doe sought to block issuance of the report, which she argued would deprive her and others like her "of life and liberty without due process of law, subject them to cruel and unusual punishment, and deprive them of their right to privacy."

The court held, in part, that Mary Doe lacked standing to litigate her claims because she was not a person recognized by the Constitution. The court stated that putting "philosophical and religious considerations aside, the Supreme Court has made it clear that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."

Since Roe did not assign a precise moral or legal status to fetal life, one commentator has argued that the "decision. . . still leave[s] it to the legislative branch to determine whether embryos can be killed in the name of scientific progress."

Id.

82. BVerfGE 39, 1 (37).

CONCLUSION

If the precise outcome of the balancing to be carried out by the American and German constitutional courts in the stem cell context is not obvious, the balancing method itself promises one clear result: the absolutist claims of those who argue for the protection of "embryonic life," just like claims for the significance of scientific research dependent upon human stem cells, are to be rejected as imperatives.[83] As Aleinikoff explains: "Balancing suggest[s] a particularistic, case-by-case, common law approach that accommodate[s] gradual change *and reject[s] absolutes*."[84]

As a constitutional matter, the German National Ethics Council assessed the stem cell issue in exactly these terms:

> Neither a right to protection of dignity nor a right to "absolute" protection of life for this early embryonic life can be derived from Article 1(1) and the first sentence of Article 2(2) of the German Basic Law (Constitution). The contrary view not only mixes up the guarantee element of these two provisions, but also, in particular, disregards the central question of the subject of the relevant rights—that is, the conditions that must be satisfied in order fully to enjoy the right to the protection of life or, as the case may be, of dignity. On closer examination, the postulate of an "absolute" protection of life for early embryos based on considerations of human dignity proves to be an impermissible circular argument that lacks any foundation in the Constitution....[85]

The promise that neither side of an intensely debated social question is likely to be wholly vindicated, and the fact that such a society persists in spite of this, is inherent to the "identity" and "difference" of constitutionalism. Balancing such claims as a method of constitutional interpretation, perhaps better than other methods, is particularly well suited to reconciling differences and reinforcing identity. I think this process says much more about the really important things the United States and Germany share in common than do the divergent outcomes of any specific balancing exercise. In fact, the balancing method is merely the

> manifestation in legal studies of a [broad] intellectual movement that dominated the first half of the twentieth century. Darwinism, non-Euclidean geometry, and relativity theory had shaken the foundation of formalism in the traditional sciences; the impact in the social sciences was dramatic. Universals, logically deduced

---

83. *See* GERMAN NATIONAL ETHICS COUNCIL, *supra* note 25, at 7.

84. Aleinikoff, *supra* note 33, at 961 (emphasis added).

85. GERMAN NATIONAL ETHICS COUNCIL, *supra* note 25, at 7.

> from fixed categories, gave way to culturally-based, small 't' truths.[86]

Perhaps this is what Kagan means when he begrudgingly concedes that "the United States and Europe share a set of common Western beliefs."[87]

86. Aleinikoff, *supra* note 33, at 969.

87. KAGAN, *supra* note 6, at 103.